IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs at Jackson February 5, 2008

STATE OF TENNESSEE v. TONY LYNN ALLEN

Appeal from the Criminal Court for Putnam County
No. 06-0028 Leon C. Burns, Jr., Judge

No. M2007-00826-CCA-R3-CD - Filed July 15, 2008

The defendant, Tony Lynn Allen, pled guilty to violation of a habitual motor vehicle offender (HMVO) order, a class E felony, see T.C.A. § 55-10-616, and received a two-year sentence, suspended after sixty days in jail. He reserved a certified question on appeal regarding whether the trial court erred in not setting aside the 1984 order declaring him a habitual motor vehicle offender and not dismissing the charge for violation of the HMVO order. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

David Neal Brady, District Public Defender, and H. Marshall Judd, Assistant Public Defender, for the appellant, Tony Lynn Allen.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Anthony J. Craighead, Interim District Attorney General; and Marty S. Savage, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At the plea submission hearing, the state summarized the facts giving rise to the petitioner's conviction as follows:

> [T]his occurred on November the 25th, 2005. Todd Logan with the Putnam County Sheriff's Office was responding to a call with a possible intoxicated person sitting in a vehicle at the Echo Valley Market. He arrived at the market, found the defendant to be seated behind the wheel of the vehicle.

> Upon speaking with him, the defendant did admit that he drove the vehicle to that location. A check of his license status revealed that he was declared an habitual offender.

The defendant was charged in Count 1 with public intoxication and in Count 2 with violation of an HMVO order. He filed a motion to dismiss, requesting the court to set aside the HMVO order that was filed after the default judgment in 1984 and to dismiss Count 2 of the indictment. The court denied the motion, finding that the defendant did not move to dismiss the order within a reasonable time, and the defendant pled guilty to Count 2, reserving for appeal the following certified question:

> [W]hether the court erred in not setting aside the order entered on January 9, 1984, declaring him an habitual offender and dismissing Count 2 of indictment charging defendant with Violation of the Habitual Motor Vehicle Offender Law, because defendant was not given notice of default judgment as required by [Tennessee] Rule [of Civil Procedure] 55.01, and defendant was not served a copy of final judgment, as required by Rule 58 of Tennessee Rule[s] of Civil Procedure, all of which is dispositive of this case.

See Tenn. R. Crim. P. 37(b)(2)(A) (permitting appeal of conviction based on guilty plea when certified question of law is properly reserved).

The defendant challenges the validity of the 1984 HMVO order entered by the White County Criminal Court. According to the order, it was entered after the defendant failed to appear in court and present a defense. The order is dated January 9, 1984, and is signed by the trial judge and the district attorney general. It is not signed by the defendant or the defendant's counsel. It directs the trial court clerk to send a certified copy to the defendant at his last known address but does not contain a certificate of service to the defendant. The defendant argues that the order is invalid for the following reasons: (1) he was not given five days notice of the state's intent to apply for default judgment as required by Tennessee Rule of Civil Procedure 55.01; and (2) he was not served with a copy of the order, nor does the order reflect that he was served with a copy, as required by Tennessee Rule of Civil Procedure 58. The state responds that the defendant was not entitled to have the HMVO order dismissed because the Putnam County court was without jurisdiction to dismiss the White County order and because the motion to set aside the order was not filed "within a reasonable time" as mandated by Tennessee Rule of Civil Procedure 60.

Initially, we note that although prosecutions under Tennessee Code Annotated section 55-10-616(b) for operating a motor vehicle in violation of an HMVO order are criminal, the initial proceeding by which an HMVO order is entered is civil in nature and governed by the Tennessee Rules of Civil Procedure. See State v. Malady, 952 S.W.2d 440, 444 (Tenn. Crim. App. 1996); Everhart v. State, 563 S.W.2d 795, 797 (Tenn. Crim. App. 1978). Therefore, an HMVO order must comply with the Rules of Civil Procedure, and the appropriate procedure for challenging an HMVO

order is to file a motion pursuant to Tennessee Rule of Civil Procedure 60.02. Bankston v. State, 815 S.W.2d 213, 216 (Tenn. Crim. App. 1991).

In the present case, the defendant filed a motion to dismiss his Putnam County indictment on Count 2, contending that his White County HMVO order, entered by default judgment, should be set aside pursuant to Rule 60.02. The defendant argues that the order was entered in violation of Rules 55 and 58 of the Tennessee Rules of Civil Procedure. According to Rule 55.01, a party against whom default judgment is sought "shall be served with a written notice of the application for judgment at least five days before the hearing on the application, regardless of whether the party has made an appearance in the action." Tenn. R. Civ. P. 55.01. In the present case, nothing contained in the record indicates whether the defendant received the requisite notice before the default judgment was entered against him. In fact, the only evidence in the record of the original HMVO proceeding is the 1984 order itself, which only states that the defendant failed to appear and make a defense regarding the state's attempt to declare him a habitual offender, without stating when appearance was required or whether the defendant received notice before the entry of the default judgment.

The defendant also argues that the order is not effective pursuant to Rule 58 of the Tennessee Rules of Civil Procedure, which states,

> Entry of a judgment or an order of final disposition is effective when a judgment containing one of the following is marked on the face by the clerk as filed for entry:
>
> (1) the signatures of the judge and all parties or counsel, or
>
> (2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or
>
> (3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.

Tenn. R. Civ. P. 58. The purpose of this rule "is to [ensure] that a party is aware of the existence of a final, appealable, judgment in a lawsuit in which he is involved." Masters by Masters v. Rishton, 863 S.W.2d 702 (Tenn. Ct. App. 1992). As the defendant in the present case notes, the 1984 order declaring him a habitual motor vehicle offender does not contain his signature, a signature of his counsel, or a certificate of service to the defendant. Therefore, the order does not comply with Rule 58. Moreover, nothing in the record indicates that the defendant had actual notice of the order or his status as a habitual offender. The affidavit of complaint, which led to his present conviction, states that the defendant was found to have three prior convictions for driving on a revoked license in 1984, 1990, and 1997; a conviction for driving while intoxicated in 1997; and "several other traffic convictions after the defendant was convicted an habitual offender." However, nothing in the record indicates that the defendant has prior convictions for driving in violation of the HMVO order or that he otherwise had notice of his habitual offender status.

The trial court did not discuss the merits of the defendant's attack on his 1984 order, instead declining to grant the defendant's motion to dismiss because the defendant did not seek to set aside the twenty-two-year-old order "within a reasonable time," as mandated by Rule 60.02. See Tenn. R. Civ. P. 60.02 (stating that a motion to set aside a judgment that is void must be made "within a reasonable time"). The state asks us to affirm the trial court's judgment on this basis and also raises for the first time on appeal the argument that, at any rate, the Putnam County court did not have jurisdiction to set aside the White County order.

We will not discuss whether the defendant's request to set aside the HMVO is timely under Rule 60.02 because we conclude that the defendant's current attempt to set aside the order is an impermissible collateral attack on the previous judgment of another court. See State v. Davis, 793 S.W.2d 650, 651 (Tenn. Crim. App. 1990) (holding that defendant could not collaterally attack the previous judgment declaring him to be a habitual offender); see also State v. Michael Samuel Eidson, C.C.A. No. 03C01-9711-CR-00506, Sullivan County, slip op. at 3 (Tenn. Crim. App. Mar. 24, 1999) ("A collateral attack in a separate proceeding such as this is not permissible.") (citing Everhart v. State, 563 S.W.2d 795, 797-98 (Tenn. Crim. App. 1998)). Although the defendant cites Tennessee Rule of Civil Procedure 60.02 as grounds for setting aside the prior judgment, instead of bringing a Rule 60.02 motion in the White County court, he raised the issue for the first time in a motion to dismiss his Putnam County indictment for violating the order. In Michael Samuel Eidson, this court stated that a motion to dismiss in the criminal case was not the proper procedure for challenging the prior judgment. Cf. State v. James Rowe Hudson, No. W2003-02433-CCA-R3-CD, Carroll County and Henry County (Tenn. Crim. App. Sep. 21, 2005) (granting relief to defendant who filed motion in Carroll County to set aside Carroll County HMVO order and subsequent motion to dismiss Henry County charge for violating HMVO order). Therefore, the trial court properly denied the defendant's motion to dismiss, and the defendant is not entitled to relief on appeal.

Based on the foregoing and the record as a whole, we affirm the judgment of the trial court.

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JOSEPH M. TIPTON, PRESIDING JUDGE